MARCELLUS N. JOSLYN,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, AND THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, DIVISIONS TWO, THREE AND FIVE,

Respondents.

MERRITT L. JOSLYN, MARY C. PARKER CURRIVAN, RONALD MERRITT JOSLYN, JOY LOUISE MacNULTY, JOYLON DAVID JOSLYN, THEODORE NEWELL JOSLYN, CELIA ALICE PARKER, M. WESLEY PARKER, III, MARCELLUS JOSLYN PARKER, ALICE JOSLYN, WILLIAM DWIGHT JOSLYN, PENNY IRENE JOSLYN, MARCELLUS LeFEVRE JOSLYN, MARINA ELAINE JOSLYN, LOIS E. MENDENHALL, MRS. MARY R. SHOFF CAREY, ROBERT F. DOLAN, BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY, and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased,

Real Parties in Interest.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 990

In the Matter of the Estate of
MARCELLUS LINDSEY JOSLYN, also known as MARCELLUS L. JOSLYN, and as M. L. JOSLYN,

Deceased.

MARCELLUS N. JOSLYN,

Petitioner,

vs.

MERRITT L. JOSLYN, MARY C. PARKER CURRIVAN, RONALD MERRITT JOSLYN, JOY LOUISE MacNULTY, JOYLON DAVID JOSLON, THEODORE NEWELL JOSLYN, CELIA ALICE PARKER, M. WESLEY PARKER, III, MARCELLUS JOSLYN PARKER, ALICE JOSLYN, WILLIAM DWIGHT JOSLYN, PENNY IRENE JOSLYN, MARCELLUS LeFEVRE JOSLYN, MARINA ELAINE JOSLYN, LOIS E. MENDENHALL, MRS. MARY R. SHOFF CAREY, ROBERT F. DOLAN and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased.

Respondents.

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(Continued on page two)

MERRITT L. JOSLYN, MARY C. PARKER CURRIVAN, RONALD MERRITT JOSLYN, JOY LOUISE MacNULTY, JOYLON DAVID JOSLYN, THEODORE NEWELL JOSLYN, CELIA ALICE PARKER, M. WESLEY PARKER, III, MARCELLUS JOSLYN PARKER, ALICE JOSLYN, WILLIAM DWIGHT JOSLYN, PENNY IRENE JOSLYN, MARCELLUS LeFEVRE JOSLYN, MARINA ELAINE JOSLYN, LOIS E. MENDENHALL, MRS. MARY R. SHOFF CAREY, ROBERT F. DOLAN, BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY, and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased,

Real Parties in Interest.

PETITIONER'S REPLY TO RESPONDENT

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Counsel for respondent has, in a duplicated response to the petition for certiorari directed to the Court of Appeal, Second Appellate District, State of California in No. 990, and in No. 991 directed to the Supreme Court of California, misconceived the procedure in these cases and the remedy authorized by law. He has misstated the facts and law.

In our petition for certiorari in case No. 990, we asked this Court to grant certiorari from a denial by the Court of Appeal, Second Appellate District, State of California, of our petition to recall the remittitur

upon the grounds that court granted judgment of dismissal improvidently *upon a false suggestion and under a mistake as to the facts of the case* and acted arbitrarily and capriciously in denying an appeal from the order of the Superior Court without trial or hearing, denying petitioner herein his statutory right of a will contest. Thus its judgment of dismissal was in fact no judgment. See *In re Rothrock,* 14 Cal. (2) 34, 39.

The post probate will contest involved petitioner's father's estate, approximating $15,000,000, together with a power of appointment in his father's purported will affecting his deceased mother's estate of $2,500,000. The effect of the purported dismissal was to wipe out petitioner's interest in the will. The will under which the son was excluded from all monetary benefits and therefore was an unnatural will was drawn by a lawyer who, after ingratiating himself with decendent became executor of the estate after decedent's death and trustee of testamentary trusts by the will he drew and under its terms was financially benefitted. The purported will was executed when the decedent was 89 years old and in feeble health.

Examination of the document itself (which is photostated in the record submitted to this Court) apparently shows irregularity on its face in connection with the date on which the purported will was executed, to wit: June 29, 1962 (page 41 of Petition to Recall the Remittitur). If this irregularity is established it will nullify the will.

Under the situation herein, where the will was drawn by the lawyer-confident, the California law presumes that there has been undue influence by the lawyer in his own behalf, thus it invalidates the will, but holds the will, if not executed on the date and under the requirements of due execution under California law to be void and nugatory.

Priester v. Citizens Nat. Bank, 131 Cal. App. 2d 314, 280 P. 2d 835

Gold v. Velkov, 133 Cal. App. 2d 622

Bradner v. Vasquez, 43 Cal. 2d 147, 151

Ferrara v. La Sala, 186 Cal. App. 2d 263, 271, 42 Cal. L. Rev. 865, 13 Hast. L. Journal 2, 7 Am. Jur. 2d 106

Rader v. Thrasher, 57 Cal. 2d 244.

Such a will is also presumed to be lacking in consideration.

Rader v. Thrasher, 57 Cal. 2d 244
Magee v. State Bar, 58 Cal. 2d 423, 435.

After the California court prematurely dismissed the appeal, affirming the dismissal of the will contest, without a contested trial before a jury, the objection was raised in proceedings duly had in the California Courts that the dismissal of the will contest was without due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States

(Petition to Recall the Remittitur, page 2). The court summarily denied our motion which duly and properly and timely raised the federal questions under the Fifth and Fourteenth Amendments to the Constitution of the United States (pages 2, 8, 9, 11, 16, 19, 20, 21, 22, 23, 30, 31, 40, 53 and 56) and on our petition for hearing in the Supreme Court of California we again timely challenged the arbitrary dismissal in the Court of Appeal, affirming the dismissal of the statutory will contest as in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Petition for Writ in Supreme Court of California (R. 4, 5, 13, 15, 18, 19) Exhibit A, pp. 8-10.

The supreme Court of California arbitrarily denied a hearing of our timely petition to recall the remittitur on the ground that our rights under the federal Constitution had been denied and that it was violative of the Fourteenth Amendment to the Constitution of the United States. That court denied a hearing September 7, 1967. A petition to recall the remittitur authorized by California procedure is a direct attack on the judgments below, resulting from denial of federal Constitutional rights.

In re Rothrock, 14 Cal. 2d 34, 39
Rowland v. Kreyenhagen, 24 Cal. 52
Trumpler v. Trumpler, 123 Cal. 248
Isenberg v. Sherman, 214 Cal. 722.

In *Lisenba v. California,* 314 US 219, 86 L. ed. 66 (2 cases), the Court had before it two cases in which the constitutional questions of due process of law had first been raised in the Supreme Court of California on rehearing in one case (a direct attack on the judgment) and on habeas corpus (a collateral attack). The Court granted certiorari in both cases and the case was heard twice by this court. Mr. Justice Roberts pointed out that the Supreme Court of California had affirmed the original judgment and a rehearing granted, but no question arising under the Constitution of the United States had been raised or considered. *"In a second petition for rehearing the petitioner, for the first time, asserted that his conviction violated the Fourteenth Amendment. November 3, 1939 the Court ruled the* petition for rehearing herein is denied. This Court held that on the record that showing that on the second petition for rehearing in the Supreme Court of California the court entertained the petition and explicitly overruled each of the contentions made therein, established the jurisdiction of the United States Supreme Court to review the judgment. The Court also allowed and considered the appeal on the collateral attack by habeas corpus. (311 U.S. 222, 86 L. ed. 173)

Likewise, we here specifically raised the federal constitutional question and the denial by the court below showed that it considered the case on the federal grounds presented and overruled and denied the same.

We specifically raised the question as to the right to dismiss *a will* contest or an amended will contest provided by the California statutes, the basis of dismissal being solely alleged failure to grant discovery provided by Section 2034 of the Code of Civil Procedure and we challenged the statute, Section 2034 C.C.P.—inherently and as construed and applied in this case, as violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The issues were plain and simple. Where a state statute authorizes a contest of a will to determine the property rights flowing from a decedent. can a beneficiary (the eldest son of the decedent) be deprived of that property arbitrarily and capriciously without trial for alleged non-compliance with a so-called rule of discovery? Can his pleadings be arbitrarily stricken? Can he be deprived of a jury trial guaranteed by the constitution of his state? Does such a procedure take the petitioner's property without due process of law under the 14th Amendment to the U.S. Constitution and give it to somebody else without trial or hearing on the merits of the validity of the will?

We respectfully contend that it does and that judgment below construing Section 2034 of the Code of Civil Procedure of the State of California as authorizing and permitting the summary dismissal of the will contest and an amended will contest, without trial or

hearing, violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Respondents' statements of the factual background are incorrect. There is nothing in the will or record to show that Marcellus L. Joslyn had made any provisions through any other trusts or procedure to provide for his $15,000,000 estate which he left at the time of his death. Nothing in the will declares any such a factual situation, nor is there anything in the record before this Court that we know of that support such a statement. It is true that Alice N. Joslyn, mother of petitioner, made provisions for her son in her will and named him to be the executor of her estate and one of the testamentary trustees if others did not qualify, but some of these provisions were wiped out by the provisions in Marcellus L. Joslyn's will naming Robert D. MacDonald as successor trustee to Marcellus L. Joslyn upon Marcellus L. Joslyn's death.

How much petitioner receives or what he gets out of Alice Joslyn's estate is not before the Court in this matter and is improperly referred to in the statement.

Furthermore, counsel has quoted in Appendix 1 a declaration of Ernest Zack in support of a motion for order dismissing will contest. The deposition referred to in that exhibit was never completed or corrected or signed although respondents took five days in taking it, but it does not answer the triable issue here of whether there was undue influence and lack of consideration

on the part of the attorney drawing the will that is now before the Court, and furthermore, does not answer the issue of whether the witnesses actually observed the date of the 29th of June written in on the will, apparently altered and the "9" written over some other figure that appears underneath it, and thus invalidated the entire will, or whether there was another alteration.

In a will contest, all the petitioner's counsel would need to do would be to introduce the purported will and prove that MacDonald, the confidante, business partner and legal advisor, had written it with financial benefits to himself. Respondent admits this fact. California law would then presume undue influence and lack of consideration, a prima facie case would be made out and petitioner could even rest at this point if he wished to do so.

Estate of Rohde, 158 Cal. App. 2d 19, 323. P 2d 490

Magee v. State Bar, 58 Cal. 2d 423

The court in the *Magee* case said "Even though an attorney may be acting only to carry out the wishes of his client in drawing a will containing a gift to himself he should send the client to another lawyer when the circumstances would support an inference of wrongdoing. (58 Cal. 2d 433)

Bradner v. Vasquez, 43 Cal. 2d 147, 151

Priester v. Citizens Nat. Bank, 131 Cal. App. 2d 314.

A second matter set up in respondents' opposition is the purported findings of fact, conclusions of law and order dismissing amended will contest after probate.

Counsel would have this court believe that findings were based upon a trial and hearing. This is incorrect. The record shows that there was no trial in a true sense and no evidence upon which the alleged findings of fact were or could be based. Contrary to assertions of counsel, neither declarations nor affidavits are admissible evidence in California probate proceedings except to establish an uncontested will, or date of death.

In a contested trial petitioner would be entitled to a jury of which he was deprived here.

In the absence of statutory permission, an affidavit or declaration is not competent evidence; though made under oath, it is hearsay because there has been no opportunity to cross-examine the affiant or declarant.

Estate of Fraysher, 47 Cal. 2d 131, 135
Feuel v. Feuel, 23 Cal. 2d 431, 438.

Affidavits are allowed in evidence in California in probate proceedings only in uncontested matters. (Probate Code Sec. 329, evidence of subscribing witness; Probate Code, Sec. 1170, establishment of fact of death.)

The findings of fact, contrary to the footnote regarding findings of fact by state courts, are independ-

ently examined by this Court when a constitutional question of due process is raised to determine if there is any evidence to support the findings of fact or conclusions of law.

This Court will make its own independent examination of the evidence where there is no evidence to sustain the judgment for such judgment is void.

Cole v. Arkansas, 333 US 196, 92 L. ed. 644
DeJonge v. Oregon, 299 US 353, 81 L. ed. 278.

This Court is not precluded from making an independent determination as to legal conclusions and inferences from findings and if there is no evidence to support findings, there can be no legal conclusions or inferences.

U.S. v. Mississippi Valley Generating Co., 364 U.S. 520, 5 L. ed. 2d 268
U.S. v. E. I. DuPont de Nemours & Co., 353 US 596, 598, 1 L. ed. 2d 1057
Great A. & P. Tea Co. v. Supermarket Equipment Corp., 340 US 147, 153, 154, 95 L. ed. 162, 167.

The test of judicial review is whether there is substantial evidence on the record as a whole. If the court finds there is no substantial evidence, it will reverse the judgment.

Illinois Central R. Co. v. Norfolk & Western R. Co., 385 US 57, 17 L. ed. 2d 162.

Reviewed on the record as a whole, the petitioner's right to a trial on the merits of his will contest should be granted. There is no substantial evidence, under due process of law, with witnesses testifying and being cross-examined on the basis of which the court could make any findings whatsoever on the *amended will contest.* There is nothing to support the findings and judgment and conclusions of law.

Thus summarizing the reasons for granting the writ, the constitutional issues were timely raised in the courts of California, in the Court of Appeal and in the Supreme Court, and that court denied the claim of violation of rights of due process of law under the Constitution of the United States and the challenge to the constitutionality of Section 2034 of the Code of Civil Procedure, inherently and as construed and applied in this case, as violative of the Fourteenth Amendment to the Constitution of the United States.

The petition for certiorari was timely filed in this Court within the time allowed by law and the extension granted by Justice Douglas.

The petitioner has been denied his day in court (a law which hears before it condemns) on a will contest involving a $15,000,000 estate of his father from which he and his brothers and sisters were unnaturally excluded from any monetary benefits and given a few pieces of bric-a-brac and other non-essential furniture. The lawyer who drew the will for this 89-year old ill

father personally benefitted and will benefit under it and the will was therefore presumptively the product of undue influence and lack of consideration. Examination of the document exhibits an infirmity as to the date inserted into it which may make the document void on trial.

The decision of the state court on the recall of the remittitur was based on federal grounds, adequately raised therein, which federal grounds were considered and denied. The constitutionality under the federal Constitution was fully and adequately presented and acted upon by the Court of Appeal and the Supreme Court of California. The procedure and proceedings was special, partial and arbitrary and a denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

A trial without evidence presented from the witness stand and subject to cross-examination is in fact no trial and is a denial of due process of law. The findings are, therefore, a sham and a nullity.

In re Oliver, 333 US 257, 92 L. ed. 682
In re Murchison, 349 US 133
Turner v. Louisiana, 379 US 466, 472, 473
Irwin v. Dowd, 366 US 717, 6 L. ed. 2d 651
Sinclair v. U.S., 279 US 649, 73 L.ed. 938
Thompson v. City of Louisville, 362 US 199, 4 L. ed. 2d 654
Pointer v. Texas, 380 US 400, 406
Toomey v. Ohio, 272 US 510.

Where there has been no fair adversary trial, the judgment must be vacated.

Hallett v. Slaughter, 22 Cal. 2d 552, 557.

This Court has recently, in different opinions, again expressed its view that there should be a trial on the merits. Mr. Justice Black, in various opinions, has expressed alarm over the summary procedure which is being practiced, denying litigants their day in court. We have brought this out in our opening brief and cited the leading authorities of *Hovey v. Elliott,* 167 US 490, and *Societe Internatiale pour Participations Industrielles v. Rogers,* 357 US 197, and Mr. Justice Black's views expressed in connection with the Federal Rules of Criminal and Civil Procedure recently promulgated.

Petitioner's case and cases cited in our petition may easily rest upon the unnatural will itself and the presumption of undue influence and lack of consideration of the attorney who drew the document making himself executor and trustee and thus principal financial beneficiary under the will of Marcellus L. Joslyn and also successor trustee under the Alice Joslyn estate. The burden, therefore, of going forward is upon him on the face of the record, not upon petitioner.

Furthermore, petitioner seeks a right to establish the validity or invalidity of the writing of the will and all surrounding circumstances. It does not behoove him to try his case outside of trial and thus to have two trials of the issue. He seeks but a single trial under the

statutes of California which authorize a will contest before a jury to a relative and eldest son, who is excluded from financial benefits of his father's large estate and will by an interloper, who has placed himself in a position of trust and confidence in the affairs of an elderly and ill man.

Contrary to respondents' contentions, petitioner has not been heard on the merits of the will contest, undue influences upon his aged father before the will was drafted irregularity in the date of execution, lack of competent witnesses regarding the will and its execution. If respondents really wish to give him an opportunity to be heard on the merits, as he is entitled to by California law, by a jury of his peers, they will stipulate to the granting of certiarari and the reversing of the judgment below, so that he may have a fair trial on the merits of his contest before a fair jury and fair judge.

We pray for certiorari.

Respectfully submitted,

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